IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-448

TOMMY REID, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Does the Fourth Amendment probibit a law enforcement officer from stopping an individual in order to obtain a person's identity when such a stopping is based upon a compilation of suspicious actions by that individual which correlate with a drug courier profile which is applied to individuals who have recently deplaned?

STATEMENT OF THE CASE

For the purposes of responding to the petition for writ of certiorari, Respondent is in agreement with the statement of facts as set forth in the petition for writ of certiorari. Consequently, no additional facts will be presented at this time in responding to the petition.

REASON FOR NOT GRANTING THE WRIT

A MOMENTARY STOPPING OF AN INDIVIDUAL FOR IDENTIFICATION WHEN THAT PERSON'S CONDUCT IS IN CONFORMITY WITH A SET OF OBJECTIVE OPERATIVE FACTS WHICH ARE INDICATIVE OF ONE ENGAGED IN DRUG TRAFFICING DOES NOT CONSTITUTE AN UNREASONABLE SEIZURE OR STOPPING UNDER THE FOURTH AMENDMENT.

The stopping of the Petitioner in the early morning hours of August 14, 1979, at the Atlanta Hartsfield Airport was occasioned by a law enforcement officer observing a pattern of suspicious activity on the Petitioner's part which was in conformity with a "drug courier profile" which the Drug Enforcement Administration of the Department of Justice had put together.[1/]

The present petition is premised upon several recent decisions by this Court concerning the reasonableness of law enforcement activity in stopping individuals either for licensing checks or motor vehicle registration, Delaware v. Prouse, ___U.S.___, 99 S.Ct. 1397, 59 L.Ed.2d 660 (1979), the stopping of an individual solely for identity when there was no reasonable suspicion to believe that the individual was engaged, or had engaged in criminal conduct, Brown v. Texas, ___U.S.___, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), and the reasonableness of a statute which permitted a governmental unit to inspect an individual's luggage short of there being any reasonable basis for suspicion that the individual was engaged in any criminal conduct. Torres v. Puerto Rico, ___U.S.___, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979).

1/ Shortly after the filing of this petition for a writ of certiorari, this Court granted certiorari to consider this exact question upon application from the United States Attorney in the Eastern District of Michigan in United States v. Mendenhall, No. 78-1821, cert. granted, October 3, 1979, 596 F.2d 707 (6th Cir. 1979).

Each of the above-referenced cases is distinguishable from the facts in this case which involved the stopping for identity of an individual whose conduct was suspicious in terms of a set of neutral and objective facts which the Drug Enforcement Administration had compiled in connection with individuals suspected of transporting drugs through an airport. This profile is based upon the experience of law enforcement officers with the methods used in drug trafficing. That is, in Brown v. Texas, supra, the law enforcement officers who stopped an individual in an area coming out of an alley where there was known drug trafficing had no reasonable suspicion to believe that, that individual had in fact engaged in any criminal conduct. Likewise, in Delaware v. Prouse, supra, the stopping was a random stopping, and once again there was no reasonable or articulable suspicion that the individual stopped had in fact violated any of the rules of the road in the State of Delaware. Similarly, in Torres v. Puerto Rico, supra, the individual's conduct did not equate with a finding of probable cause to believe that there was any incriminating evidence in his luggage, or that any incriminating evidence would in fact be found. The "drug courier profile" to the contrary does furnish an articulable suspicion.

This Court has long recognized that any stopping by a law enforcement officer which restrains that individual's freedom is a seizure. Terry v. State of Ohio, 392 U.S. 1, 16 (1968). By the same token, this Court recognized that there was no ready-made test for determining the reasonableness of a search and subsequent seizure other than by balancing the need to seize and search against unwarranted invasions from seizure and search. This is a balancing between public interests and the individual's right to personal security free from arbitrary interference by law enforcement officers. Brown v. Texas, supra; Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977). This balancing is necessary to avoid arbitrary invasions at the unfettered discretion of law enforcement officers. Delaware v. Prouse, supra.

The Fourth Amendment is not a badge behind which criminal activity can be protected, see e.g., Harris v. New York, 401 U.S. 222, 226 (1971), nor does it protect all forms of search and seizure, but only unreasonable searches and seizures. Elkins v. United States, 364 U.S. 206, 222 (1960); Terry v. Ohio, supra at p. 8. This Court in Terry, supra, found that it was not unreasonable under the Fourth Amendment for a law enforcement officer to stop an individual for questioning when that individual had exhibited in the officer's presence conduct which was consistent with the hypothesis that a daylight robbery was contemplated by the individual approached.

> One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. Terry v. Ohio, supra at p. 22.

Even earlier than Terry, this Court in Brinegar v. United States, 338 U.S. 160 (1949), recognized that "In dealing with probable cause, however, as the very name applies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." * * * "Probable cause exists where the 'facts and circumstances within their (the officer's) knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar, supra at pp. 1[illegible]-176.

The issue presented by Petitioner is whether a law enforcement officer has reasonable suspicion to stop an individual for identification if that individual appears to fit within the framework of the "drug courier profile". That is, do the various components of the "drug courier profile" when put together, in part or in total, constitute sufficient operative objective facts which give rise to reasonably suspicious activity so as to justify an investigative stop for identification by a law enforcement officer? Respondent submits that this must be answered in the affirmative. In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), this Court indicated that in deciding whether to stop an individual, the individual's behavior would be relevant, such as if the individual made obvious attempts to evade law enforcement officers, and such behavior can support reasonable suspicion. However, in Brignoni-Ponce, supra, this Court said that the mere fact that the individuals in the automobile had a Mexican appearance, standing alone, did not justify a stop.

Respondent agrees that it takes more than one factor to constitute an articulable or reasonable suspicion which will serve as the basis for an investigative seizure. Respondent believes that this Court in Brignoni-Ponce, supra, did not dispense with the fact that a law enforcement officer in all situations is entitled to assess facts in light of his experience in detecting illegal entry or smuggling in determining whether there is a reasonable suspicion to stop a car or to stop an individual for identification. Respondent believes that this Court's recent pronouncements in Delaware v. Prouse, supra; Torres v. Puerto Rico, supra; and Brown v. Texas, supra, have not led to a holding that law enforcement officers based upon their training are to disregard conduct which would be wholly innocent to an untrained observer, but to the eye of a seasoned officer would indicate the serious likelihood that criminal activity is afoot. Brown v. Texas, supra, F.N. 2.

In Brinegar v. United States, supra, Mr. Justice Burton in his concurring opinion indicates that law enforcement officers must draw upon their experience in determining whether to stop an individual for identification.

> In my view, these earlier events not only justify the steps taken by the government agents but those events imposed upon the government agents a positive duty to investigate further, in some such manner as they adopted. It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the presence of the agent. Prompt investigation may then not only discover but, what is still more important may interrupt the crime and prevent some or all of its damaging consequences. Id. at p. 179.

Respondent submits that with rapidly unfolding drug traffic being conducted through this nation's airports police response must be accordingly flexible. This response is envisioned in the "drug courier profile," which is based upon

specific objective criteria of drug enforcement people in their experience in shutting down drug traffic. Terry v. Ohio, supra, recognizes that a stopping for identification when based on reasonable suspicion is not an unreasonable seizure. Terry, supra, as in this case, deals with a series of acts which of themselves appear innocent, but when taken together warrant further inquiry. In fact, this Court in Adams v. Williams, 407 U.S. 143 (1972), stated,

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary Terry recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Id. at pp. 145-146. Accord, United States v. McDaniel, 550 F.2d 214, 217 (5th Cir. 1977).

The initial stop of the Petitioner was not to look for drugs, but was for the purposes of obtaining his identity, because Petitioner's conduct matched with certain of the elements contained in the "drug courier profile" thus, providing a reasonable basis of suspicion that Petitioner was engaged in the crime of transporting illegal drugs. Respondent recognizes that under Sibron v. New York, 392 U.S. 40 (1968), that a Terry frisk to look for drugs is improper. However, in this instance there was no frisk, but rather

there was a Terry stop which was subsequently followed by flight.

Accordingly, Respondent submits that the "drug courier profile" contains sufficient objective facts upon which to stop an individual for the purposes of obtaining identification. As Respondent noted, this Court in Brown v. Texas, supra, at F.N. 2, seems to indicate that a trained and experienced law enforcement officer may be entitled to stop an individual for questioning when that conduct to the untrained eye appears to be wholly innocent. More importantly, there was more than just the fact that Petitioner got off a plane from a city from which drug traffic is known to originate. Petitioner's conduct fulfilled approximately four of the eleven parts of the "drug courier profile". The elements of the drug profile are not subjective, but are objective factors based upon the experience of trained and seasoned law enforcement officers. The stopping of the Petitioner is nowhere near as egregious as that in Davis v. Mississippi, 394 U.S. 721 (1969), wherein this Court found that the stopping of Davis was for questioning as a potential suspect. Sub judice, the Petitioner's conduct was more than that of a potential suspect, but was a detention based upon the reasonable suspicions of a trained law enforcement officer who used objective criteria embodied in the "drug courier profile."

Furthermore, as this Court noted in Terry v. Ohio, supra, at p. 19, F.N. 16, "not all personal intercourses between policemen and citizens involves 'seizures' of persons." In looking at the totality of the circumstances as revealed by the record, see, Beck v. Ohio, 379 U.S. 89, 91 (1964), the initial stopping of the Petitioner

was not an unreasonable seizure. See also, United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Lewis, 556 F.2d 386 (6th Cir. 1977), cert. den., 434 U.S. 985 (1978); United States v. Scott, 545 F.2d 38 (8th Cir. 1976), cert. den., 429 U.S. 1066 (1977); United States v. Riggs, 474 F.2d 699 (2nd Cir. 1973), cert. den., 414 U.S. 820 (1973); United States v. Allen, 421 F.Supp. 1372 (D.C. Mich. 1976).

Furthermore, this Court may properly conclude that with the initial stopping being a reasonable procedure, Petitioner's subsequent flight invites pursuit which colored conduct which might have appeared to the untrained observer to be innocent. See, United States v. Vasquez, 534 F.2d 1142 (5th Cir. 1976); United States v. Rundle, 461 F.2d 860, 863-864 (3rd Cir. 1972).

Equally without merit is the Petitioner's contention that his case would have been decided differently by the Georgia Court of Appeals if it had been presented to a different panel. Petitioner makes this assertion on the basis of a subsequent decision, where a similar course of conduct was ruled to be an unreasonable seizure because the "drug courier profile" does not provide articulable suspicion to seize an individual. Bowers v. State, ___ Ga. App. ___ (1979). This argument however, fails to take into consideration that Petitioner's case was decided prior to Torres v. Puerto Rico, supra, and Brown v. Texas, supra. Petitioner's case was decided on April 4, 1979.

More importantly, is the fact that regardless of the Bowers, supra decision, this Court should conclude that on the basis of the opperative facts and those particular portions of the "drug courier profile" which were used by the law enforcement officer in this case, that the initial stopping for identification does not constitute an unreasonable seizure.

CONCLUSION

For these reasons, Respondent respectfully urges this Court to deny the petition for writ of certiorari filed on behalf of the Petitioner, Tommy Reid, Jr.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of the same in the United States mail, with proper address and adequate postage to:

Mr. Dennis S. Mackin
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This 23rd day of October, 1979.

/s/
JOHN C. WALDEN